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WAWASAN RAYA (M) SDN BHD & ORS v. MARC SERVICE RESIDENCE MANAGEMENT CORPORATION

COURT OF APPEAL, PUTRAJAYA
SEE MEE CHUN JCA
LIM CHONG FONG JCA
B WONG KIAN KHEONG JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-719-04-2023]
9 APRIL 2025

C **Abstract** – *(i) A court cannot suo motu strike out a pleading under O. 18 r. 19(1) of the Rules of Court 2012 without an application from a party, as doing so may contravene the first rule of natural justice (precluding bias) and the second rule of natural justice (the right to be heard); (ii) A management corporation, as defined in s. 2 of the Strata Management Act 2013, cannot prohibit short term rental of parcels in a development area unless there is an express or implied prohibition; (iii) It is an error of law for a High Court to decide on issues not agreed to by the parties during pre-trial case management without first informing all parties and allowing them to prepare and submit on the new issues.*

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STRATA PROPERTY: *Management corporation – Short term rental – Prohibition – Residential parcels in apartment prohibited from being used for commercial purpose or short term rental – Whether management corporation can prohibit short term rental of parcels in development area – Whether there was implied or express prohibition in statutes, House Rules or relevant agreements – Strata Management Act 2013 – Strata Management (Maintenance and Management) Regulations 2015*

F

CIVIL PROCEDURE: *Striking out – Counterclaim – Suo motu – Court struck out counterclaim on its own motion without application from party – Whether allowed – Whether there was breach of rule of natural justice – Rules of Court 2012, O. 18 r. 19(1)*

G

CIVIL PROCEDURE: *Trial – Issues – Court decided on issues which had not been agreed to by parties and did not decide on issues to be tried – Whether amounted to error of law – Whether in breach of rule of natural justice*

H

The respondent ('plaintiff') was the management corporation of an apartment. The first appellant ('first defendant') was the registered proprietor of three parcels and had rented five parcels in the said apartment. On the plaintiff's sixth annual general meeting ('AGM'), there was dispute on what was passed with regard to Agenda No. 8, Resolution No. 3. The plaintiff filed a suit at the High Court against 202 defendants who owned the parcels

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in the apartment ('parcel owners'), seeking, *inter alia*, injunctions to: (i) compel the defendants to comply with the plaintiff's House Rules ('HR') and the by-laws in the third schedule to the Strata Management (Maintenance and Management) Regulations 2015 ('SMR') governing the use of the parcels; and (ii) restrain the defendants from violating the HR and the third schedule by 'managing, maintaining and/or operating' their parcels for, among others, short term rental ('STR'). The plaintiff obtained an *ex parte* interlocutory injunction to restrain the defendants from using their parcels for STR until the disposal of the suit. The High Court subsequently granted an *inter partes* interlocutory injunction on the same terms of the *ex parte* interlocutory injunction. The second appellant ('203rd defendant') rented several parcels but was not sued by the plaintiff. Aggrieved by the above injunctions, the 203rd defendant applied to intervene and this was allowed. The 203rd defendant counterclaimed against the plaintiff and the members of the plaintiff's management committee but the counterclaim was struck out. Only the first and 203rd defendants opposed the suit while all the other defendants agreed to comply with the *ex parte* and *inter partes* interlocutory injunctions. In allowing the suit, the High Court held that: (i) all the residential parcels in the apartment were prohibited from being used for commercial purpose or STR; and (ii) a perpetual injunction was granted to compel all the defendants to comply with the HR and to restrain them from using the residential parcels in the apartment for commercial purpose or STR. Hence, the present appeal by the first and 203rd defendants against the decision of the High Court. The issues that arose were: (i) whether the management corporation, as defined in s. 2 of the Strata Management Act 2013 ('SMA') of a 'development area', can prohibit STR of parcels in the development area; and (ii) can a court, on its own motion, strike out a counterclaim by a defendant, under O. 18 r. 19(1) of the Rules of Court 2012 ('ROC').

Held (allowing appeal; setting aside decision of High Court)
Per Wong Kian Kheong JCA delivering the judgment of the court:

(1) The High Court's decision pertaining to issues which had not been agreed to by parties was an error of law which warranted appellate intervention. It was contrary to the High Court Judge's ('HCJ') pre-trial case management direction ('PTCM'). If a court wishes to decide on an issue which has not been previously agreed to by parties during the PTCM, in accordance with the second rule of natural justice, the court should inform all parties regarding the new issue so as to enable them to prepare and submit on the new issue. Our litigation is based on an adversarial system. If a court decides on a question which has not been previously agreed to by parties, pursuant to the court's own PTCM direction under O. 34 r. 2(2)(k) of the ROC, this may offend the first rule

of natural justice. Regrettably, the HCJ did not decide on the second to fifth issues to be tried. Such an omission was tantamount to a legal error on the HCJ. (paras 27 & 28)

(2) There is nothing in the SMA and SMR, either expressly or by necessary implication, which prohibits STR. In fact, there is not even a definition of STR in the SMA and the SMR. Further, even before the voting regarding resolution no. 3 in the plaintiff's sixth AGM, there was nothing in the HR which allowed the plaintiff to prohibit STR in respect of the use of the parcels. The sale and purchase agreements and the deed of mutual covenants too did not contain any prohibition of STR with regard to the parcels. (paras 29, 32 & 36)

(3) The court, on its own motion, could not exercise any power provided in O. 18 r. 19(1) of the ROC. Order 18 r. 19(1) is to be compared with, *ie*, O. 15 r. 6(2) of the ROC which empowers the court to make an order 'of its own motion' in O. 15 r. 6(2)(a), (b)(i) or (ii). When a party ('Y') does not file an application to strike out a pleading of the other party ('Z') and the court, on its own motion, strikes out Z's pleading, the first rule of natural justice may be contravened. (paras 21 & 22)

(4) According to the first rule of natural justice, a judge must be: (i) free from actual bias; (ii) perceived by 'a fair-minded and informed observer' that there is no real danger of bias on the part of the judge; and (iii) an impartial umpire on the sidelines. Even if the judge has no actual bias against Z in Y's favour, applying the test of fair-minded and informed observer, there exists a real danger of bias on the part of the judge in favour of Y against Z. Furthermore, before the High Court *suo motu* struck out the 203rd defendant's counterclaim, the 203rd defendant was not afforded a right to be heard. There was a clear breach of the second rule of natural justice in this case. (paras 22 & 23)

Case(s) referred to:

Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation [2020] 10 CLJ 285 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

Tan Kang Hai v. Slimming Sanctuary Sdn Bhd [2016] CLJU 595; [2016] 1 LNS 595 HC ***(refd)***

YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd [1997] 4 CLJ 300 CA ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 11

Rules of Court 2012, O. 15 r. 6(2)(a), (b)(i), (ii), O. 18 r. 19(1), O. 29 r. 1(4), O. 34 r. 2(2)(k), O. 42 r. 12

Strata Management Act 2013, ss. 2, 59(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (2)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), 70(2)

For the appellants - Chow Li Kian, Lee Jia Fu & Ho Yong Yi; M/s Josephine, LK Chow & Co

For the respondent - Shahabudin Shaik Alaudin, Rosnida Che Ibrahim, Siti Nurazwani Zulkeflee & Nadia Ahmad Suhaidin; M/s Shahabudin & Rozima

[Editor's note: For the High Court judgment, please see Marc Service Residence Management v. Wawasan Raya Sdn Bhd & Ors [2020] CLJU 721; [2020] 1 LNS 721 (overruled).]

Reported by Najib Tamby

JUDGMENT

Wong Kian Kheong JCA:

Two Novel Questions

[1] This judgment raises two novel issues, namely:

(i) whether the "management corporation" (MC) (as defined in s. 2 of the Strata Management Act 2013 (SMA)) of a "development area" (as understood in s. 2 SMA) can prohibit "Short Term Rental" (STR) of "parcels" (within the meaning of s. 2 of the SMA) in the development area; and

(ii) can a court, on its own motion, strike out a counterclaim by a defendant under O. 18 r. 19(1) of the Rules of Court 2012 (RC)? This question also concerns the application of the two rules of natural justice.

[2] I had forwarded a draft of this judgment (draft) to See Mee Chun and Lim Chong Fong JJCA. Both my learned sister and brother had expressed their agreement with the draft.

Background

[3] We shall refer to the parties as they were in the High Court.

[4] The plaintiff (plaintiff) is the MC of a development area known as "MARC Service Residence" (apartment).

[5] The first defendant company (first defendant) is the registered proprietor of three parcels in the apartment. The first defendant also rented five parcels in the apartment.

[6] On 26 June 2019, the sixth annual general meeting of the plaintiff was held (plaintiff's 6th AGM). At the plaintiff's 6th AGM, there was a dispute on what was passed with regard to agenda no. 8, resolution no. 3. (resolution no. 3).

Proceedings In The High Court

[7] The plaintiff filed a suit in the High Court (this suit) against 202 defendants (defendants) who own parcels parcels) in the apartment (parcel owners).

[8] In this suit, the plaintiff's statement of claim prayed for the following relief, among others:

(i) an injunction to compel the defendants to comply with the plaintiff's 'House Rules' (HR) and the by-laws in the third schedule (By-Laws (third schedule)] to the Strata Management (Maintenance and Management) Regulations 2015 (SMR) governing the use of the parcels;

(ii) an injunction to restrain the defendants from violating the HR and the By-Laws (third schedule) by "managing, maintaining and/or operating" their parcels for, among others, STR;

(iii) an injunction to restrain the defendants from, among others, "advertising, contracting for booking and/or allowing dealing" their parcels for, among others, STR;

(iv) an injunction to compel the defendants to remove all advertisements and listings from all internet websites and other media which offer the use of the defendants' parcels for, among others, STR;

(v) the defendants shall indemnify the plaintiff if proceedings are taken by the authorities against the plaintiff for violation of the HR and applicable laws;

(vi) an injunction to restrain the defendants from interfering with or preventing the plaintiff from performing the plaintiff's obligations under the SMA;

(vii) general damages; and

(viii) costs on an indemnity basis.

[9] On 20 December 2019, the plaintiff obtained an *ex parte* interlocutory injunction from the learned High Court Judge to restrain the defendants from using their parcels for STR until the disposal of this suit (*ex parte* interlocutory injunction).

[10] The High Court subsequently granted an *inter partes* interlocutory injunction on 21 February 2020 on the same terms as the *ex parte* interlocutory injunction (*inter partes* interlocutory injunction).

[11] The second appellant company (second appellant):

(i) rented several parcels;

(ii) was not sued by the plaintiff in this suit; and

(iii) was aggrieved by the *ex parte* interlocutory injunction and *inter partes* interlocutory injunction. Hence, the second appellant applied to intervene in this suit as the 203rd defendant (203rd defendant). The plaintiff consented to the intervention of the second appellant as the 203rd defendant in this suit.

[12] The 203rd defendant filed a counterclaim against the plaintiff and the members of the plaintiff's management committee (203rd defendant's counterclaim). A

[13] The High Court, on its own motion, struck out the 203rd defendant's counterclaim with liberty to file afresh and with no order as to costs (High Court's *suo motu* striking out order (203rd defendant's counterclaim)). B

[14] Only the first and 203rd defendants opposed this suit. All the other defendants in this suit (other defendants) agreed to comply with the *ex parte* interlocutory injunction and *inter partes* interlocutory injunction. Hence, the plaintiff discontinued this suit against the other defendants. C

[15] During the pre-trial case management (PTCM) of this suit, upon the directions of the learned High Court Judge, the plaintiff, first and 203rd defendants agreed to the following issues to be decided by the High Court (agreed issues to be tried):

(i) at the plaintiff's sixth AGM, was resolution no. 3 voted upon and an additional para. 2.1(e) added to the HR? (first agreed issue to be tried); D

(ii) whether this suit was filed lawfully by the plaintiff against the defendants in this case (second agreed issue to be tried);

(iii) whether the plaintiff had prepared the latest HR (which incorporated the new para. 2.1(e) in the HR after the plaintiff's sixth AGM) and filed the latest HR with the Commissioner of Buildings of Kuala Lumpur (COB) (third agreed issue to be tried); E

(iv) whether the plaintiff as a MC needs to obtain the mandate and consent of the members of the plaintiff before filing this suit against the defendants (fourth agreed issue to be tried); F

(v) whether the plaintiff is required to comply with the undertaking given by the plaintiff during the interlocutory injunction application to pay damages to the first and 203rd defendants (fifth agreed issue to be tried); and G

(vi) whether r. 2.1(a) HR (the units are constructed for private residential dwellings and shall be used exclusively for private residential purpose only) has contravened:

(a) the express condition of land use (express land condition) on the title of the land on which the apartment is erected (land). According to the express land condition, the land should only be used for a high-rise commercial building for the purpose of serviced apartments; and H

(b) additional r. 2.1(e) HR (which was approved at the plaintiff's sixth AGM) (sixth agreed issue to be tried). I

[16] At the trial of this case (trial):

(i) two witnesses gave evidence for the plaintiff, *ie*,:

(a) Encik Ruslan bin Zainal Abidin (PW1), the property services manager of the apartment; and

(b) Datuk Affendi bin Zahari (PW2), the chairman of the plaintiff from 2019 to 2021; and

(ii) the following four witnesses testified for the first and 203rd defendants:

(a) Ms Foo May Lin (SD1), a practising advocate and solicitor. SD1 had acted for the plaintiff as follows, among others:

(1) SD1 drafted resolution no. 3; and

(2) SD1 attended the plaintiff's sixth AGM as the plaintiff's legal advisor;

(b) Encik Mohamad Akmal Nur Aliff bin Ahmad Tarmizi (SD2), the plaintiff's building supervisor. SD2 was present at the plaintiff's sixth AGM;

(c) Mr Ong Boon Cheow (SD3), the Managing Director of the first and 203rd defendants. SD3 was one of the attendees of the plaintiff's sixth AGM; and

(d) Mr Kek Soon Poh (SD4), the 17th defendant and owner of one parcel. SD4 had attended the plaintiff's sixth AGM.

[17] After the trial, the learned High Court Judge allowed this suit and adjudged as follows:

(i) all the residential parcels in the apartment were prohibited from being used for commercial purpose or STR;

(ii) a perpetual injunction was granted to compel all the defendants to comply with the HR and to restrain them from using the residential parcels in the apartment for commercial purpose or STR; and

(iii) the first and 203rd defendants were ordered to pay costs of RM50,000 to the plaintiff (subject to allocatur fee of 4%) (High Court's decision).

[18] According to the written judgment of the High Court (High Court's written judgment), among others:

(i) there is no definition of STR in law or any document which had been tendered in this suit but in general terms, STR suggests the rental of the premises for a short period of six months or less – para. 13 High Court's written judgment;

(ii) in a STR, the "intention of the parties is not to rent out the premises for purpose of residence in the ordinary sense of the word, but more to allow for a stay for a certain purpose. Once the purpose is achieved the person staying leaves after paying for the number of days of stay" – para. 14 High Court's written judgment;

(iii) in paras. 17 to 25 High Court's written judgment, the learned High Court Judge considered:

(a) the sale and purchase agreements (SPAs) between the purchasers of the parcels (purchasers) and the developer of the apartment (developer); and

(b) the deed of mutual covenants signed by the purchasers and the developer (DMCs).

According to the High Court, from a reading of the SPAs and DMCs, the parcels "are to be used for solely residential purposes" – paras. 25 and 41 High Court's written judgment;

(iv) if a person (X) is not registered with the plaintiff as a "resident" in the apartment, X is a "trespasser" and cannot therefore reside in the apartment – paras. 26 to 29 High Court's written judgment;

(v) the learned High Court Judge gave reasons in paras. 30 to 33 High Court's written judgment that the heading of r. 2.1 HR and r. 2.1(a) HR do not allow STR;

(vi) in para. 34 High Court's written judgment, the learned High Court Judge held that the plaintiff's sixth AGM voted to impose a penalty of RM200 for each violation of the HR due to the frequency of the flouting of the HR as well as the "creations of nuisance of the unsupervised number of persons" in the apartment due to the STR. The High Court dismissed the contention by the first and 203rd defendants that resolution no. 3 was passed at the plaintiff's sixth AGM to allow STR – para. 35 High Court's written judgment;

(vii) the resolutions passed at the plaintiff's sixth AGM "cannot supersede or contradict" the provisions of the DMC and HR which disallow the Apartment to be used for commercial purposes – para. 36 High Court's written judgment;

(viii) the prohibition of STR in the HR cannot be overcome by the mere imposition of a penalty of RM200 or by passing a resolution in the plaintiff's sixth AGM – para. 37 High Court's written judgment;

(ix) in covenant 3.02 DMC disallows nuisance in the parcels and common property of the apartment (common property) – para. 38 High Court's written judgment;

(x) in para. 39 High Court's written judgment, the learned High Court Judge referred to HR which prohibits the residents in the apartment from making any immoral, improper, offensive or unlawful use of the parcels and common property (parcels/common property);

(xi) the learned High Court Judge found PW1 and PW2 to be "truthful and reliable witnesses" – para. 12 High Court's written judgment. The evidence of PW1 and PW2 showed that the use of the parcels in the apartment for STR had caused the following problems:

(a) abuse of the common property;

(b) immoral and illegal activities had been carried out in the parcels; and

(c) total disregard for the peaceful enjoyment of the parcels by their occupants – para. 40 High Court's written judgment;

(xii) the learned High Court Judge decided in para. 42 High Court's written judgment that the "only way" to uplift the restriction on STR is for the plaintiff to "repeal and terminate the entire DMC and the (HR)". However, the High Court in subsequent paras. 43 to 46 High Court's written judgment, held that there is a "host of legislation" which regulates premises used for residential and commercial purposes. According to the learned High Court Judge, the by-laws (third schedule) prohibit the use of the parcels to cause nuisance to the other parcel owners; and

(xiii) as the apartment is a "purely a private residential accommodation", the apartment "cannot be utilised as a hotel or motel or for any such commercial purpose and cannot be advertised as such" – para. 47 High court's written judgment.

[19] The first and 203rd defendants had filed this appeal to the Court of Appeal against the High Court's decision (this appeal).

Our Decision

Was The High Court's Suo Motu Striking Out Order (203rd Defendant's Counterclaim) Valid?

[20] Order 18 r. 19(1) of the RC provides as follows:

> O. 18 r. 19 **Striking out pleadings** and endorsements
>
> (1) **The Court may at any stage of the proceedings order to be struck out** or amended **any pleading** or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, **on the ground that** –
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. (emphasis added)

[21] Firstly, we are of the view that the court, on its own motion, cannot exercise any power provided in O. 18 r. 19(1) of the RC. This is because O. 18 r. 19(1) of the RC has not expressly provided that the court can exercise any of the powers in O. 18 r. 19(1) of the RC on its own motion. Order 18 r. 19(1) of the RC is to be compared with, *eg*, O. 15 r. 6(2) of the RC which empowers the court to make an order "of its own motion" in O. 15 r. 6(2)(a), (b)(i) or (ii) of the RC. Reproduced below is O. 15 r. 6(2) of the RC:

O. 15 r. 6(2) *Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application:*

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely -

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

(emphasis added)

[22] There is a second reason why the High Court's *suo motu* striking out order (203rd defendant's counterclaim) is unlawful. When a party (Y) does not file an application to strike out a pleading of the other party (Z) and the court, on its own motion, strikes out Z's pleading, the first rule of natural justice may be contravened as follows:

(i) according to the first rule of natural justice, a judge must be:

(a) free from actual bias; or

(b) perceived by "a fair-minded and informed observer" that there is no real danger of bias on the part of the judge – please refer to the judgment of the Federal Court delivered by Richard Malanjum CJ

(Sabah and Sarawak) (as he then was) in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2007] 4 CLJ 725; [2007] 5 MLJ 501, at 525;

(ii) in our adversarial system of litigation, it is up to parties to conduct their cases as they see fit. The judge should, at all times, remain an impartial umpire on the sidelines. If the court acts *suo motu* to strike out Z's pleading without any application by Y, the first rule of natural justice may be breached on the ground that there is actual bias by the court in favour of Y against Z; and/or

(iii) even if the judge has no actual bias against Z in Y's favour, applying the test of a fair-minded and informed observer, there exists a real danger of bias on the part of the judge in favour of Y against Z. This is because when the court struck out the 203rd defendant's counterclaim without any application by the plaintiff, in the perception of a fair-minded and informed observer, there was a real danger of bias that the court had descended into the arena in favour of the plaintiff to the detriment of the 203rd defendant.

[23] Lastly, before the High Court's *suo motu* striking out order (203rd defendant's counterclaim) was made, the 203rd defendant was not afforded a right to be heard. There was a clear breach of the second rule of natural justice in this case.

[24] It is our hope that:

(i) in the interest of justice; and

(ii) to ensure that the court's impartiality and integrity are not questioned or doubted in any manner:

(a) any pleading should not be struck out by the court without an application by the relevant party.

Even if a provision of written law has explicitly provided for the court to act on its own motion, we urge caution and the court should not act *suo motu*. This is because if the court acts on its own motion and a party is aggrieved by a *suo motu* decision (S), S may subsequently complain that the first rule of natural justice has been infringed. In such an event, there may not be a just, expeditious and economical disposal of the case.

Whether The High Court Could Decide On Issues Which Had Not Been Agreed To By The Parties

[25] The agreed issues to be tried are prepared pursuant to the learned High Court Judge's own direction during PTCM according to O. 34 r. 2(2)(k) of the RC. We reproduce below O. 34 r. 2(2)(k) of the RC:

O. 34 r. 2 *[PTCM] when directed by the Court*

(1) …

(2) *At a [PTCM]*, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and *the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including -*

…

(k) *the filing of a statement of issues to be tried*;

(emphasis added)

[26] Despite the fact that the plaintiff, first and 203rd defendants had prepared the agreed issues to be tried on the PTCM direction of the learned High Court Judge, the learned High Court Judge decided on the following questions which were not part of the agreed issues to be tried:

(i) the High Court relied on the SPAs and DMCs to hold that the parcels were to be used solely for residential purposes;

(ii) if an occupant in a parcel was not registered with the plaintiff as a "resident", the occupant was a trespasser in the apartment;

(iii) any resolution which is passed in the plaintiff's AGM cannot override the DMC and HR;

(iv) the learned High Court Judge relied on:

(a) nuisance;

(b) immoral and/or unlawful use of the parcels;

(c) total disregard for the quiet enjoyment of the parcels by their occupants; and

(d) abuse of the common property

(1) to justify the High Court's decision;

(v) to uplift the prohibition on STR, only the plaintiff can repeal the DMC and HR; and

(vi) as the apartment was a "purely a private residential accommodation", the apartment "cannot be utilised as a hotel or motel or for any such commercial purpose and cannot be advertised as such"

(High Court's decision (issues which had not been agreed to by parties)).

[27] We are of the considered view that the High Court's decision (issues which had not been agreed to by parties) is an error of law which warrants appellate intervention (High Court's first legal error) because:

(i) the High Court's decision (issues which had not been agreed to by parties) was contrary to the learned High Court Judge's own PTCM direction pursuant to O. 34 r. 2(2)(k) of the RC;

(ii) if a court wishes to decide on an issue which has not been previously agreed to by the parties during the PTCM (new issue), in accordance with the second rule of natural justice, the court should inform all the parties regarding the new issue so as to enable the parties to prepare and submit on the new issue – please refer to *Tan Kang Hai v. Slimming Sanctuary Sdn Bhd* [2016] CLJU 595; [2016] 1 LNS 595; [2016] 5 MLRH 651, at [11]; and

(iii) our litigation is based on an adversarial system. If a court decides on a question which has not been previously agreed to by the parties pursuant to the court's own PTCM direction under O. 34 r. 2(2)(k) of the RC, this may offend the first rule of natural justice as follows:

(a) there may exist actual bias on the part of the court; or

(b) in the perception of a fair-minded and informed observer, there is a real danger of bias on the part of the court.

Whether High Court Had Omitted To Decide On Issues Which Had Been Agreed To By The Parties

[28] Regrettably, the learned High Court Judge did not decide on the second, third, fourth and fifth agreed issues to be tried. Such an omission is tantamount to a legal error on the part of the High Court (High Court's second legal error).

Is STR Prohibited By SMA And SMR?

[29] We have perused the SMA and SMR, in particular the by-laws (third Schedule). There is nothing in the SMA and SMR, either expressly or by necessary implication, which prohibits STR. In fact, there is not even a definition of STR in the SMA and SMR. We rely on the following judgment of Mahadev Shankar JCA in the Court of Appeal case of *YK Fung Securities Sdn Bhd v. James Capel (Far East) Ltd* [1997] 4 CLJ 300; [1997] 2 MLJ 621, at p. 346 (CLJ); p. 667 (MLJ):

> *Whether the contracts were illegal or otherwise is a matter for this court to decide. The trial judge found as a fact that these contracts were valid because prior to the KLSE circular, there was nothing in the KLSE rules prohibiting such contracts.*
>
> *We agree. We would go further and state that what the law does not specifically prohibit, it permits.* (emphasis added)

Whether MCs Can Prohibit STR With Regard To Parcels

[30] The "duties" and "powers" of a MC are stipulated in s. 59(1)(a) to (i) and (2)(a) to (j) of the SMA. We reproduce below s. 59(1)(a) to (i) and (2)(a) to (j) of the SMA:

s 59. Duties and powers of [MC]

(1) The duties of a [MC] shall be as follows:

(a) to properly maintain and manage the subdivided building or land and the common property and keep it in a state of good and serviceable repair;

(b) to determine and impose the Charges to be deposited into the maintenance account for the purposes of proper maintenance and management of the subdivided buildings or lands and the common property;

(c) to determine and impose the contribution to the sinking fund to be deposited into the sinking fund account for the purposes of meeting the actual or expected expenditure specified under subsection 51(2);

(d) to effect insurance according to this Act or to insure against such other risks as the proprietors may by special resolution direct;

(e) to comply with any notice or order given or made by the local authority or any competent public authority requiring the abatement of any nuisance on the common property, or ordering repairs or other work to be done in respect of the common property or other improvements to the common property;

(f) to prepare and maintain a strata roll for the subdivided buildings or lands;

(g) to ensure that the accounts required to be maintained by the management corporation under this Act are audited and to provide audited financial statements for the information to its members;

(h) to enforce the by-laws; and

(i) to do such other things as may be expedient or necessary for the proper maintenance and management of the subdivided buildings or lands and the common property.

(2) The powers of the [MC] shall be as follows:

(a) to collect the Charges from the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks;

(b) to collect the contribution to the sinking fund from the proprietors of an amount equivalent to ten percent of the Charges;

(c) to authorize expenditure for the carrying out of the maintenance and management of the subdivided buildings or lands and the common property;

(d) to recover from any proprietor any sum expended by the management corporation in respect of that proprietor's parcel in complying with any such notice or order as referred to in paragraph (1)(e);

A (e) to purchase, hire or otherwise acquire movable property for use by the proprietors in connection with their use and enjoyment of the common property;

(f) to employ or arrange and secure the services of any person or agent to undertake the maintenance and management of the common
B property of the subdivided building or land;

(g) subject to subsection 70(2), to make additional by-laws for the proper maintenance and management of the subdivided buildings or lands and the common property;

C

(h) to borrow moneys required by the management corporation in the exercise of its powers or the performance of its duties;

(i) to secure the repayment of moneys borrowed by it and the payment of interest thereon by negotiable instrument or by a charge of unpaid Charges to the maintenance account (whether already
D imposed or not), or by a charge of any property vested in it or by a combination of any of those means; and

(j) to do all things reasonably necessary for the performance of its duties under [SMA] and for the enforcement of the by-laws.
(emphasis added)

E **[31]** There is nothing in s. 59(1)(a) to (i) and (2)(a) to (j) of the SMA which confers any "duty" and "power" on MCs, including the plaintiff, to regulate the use and occupation of a "parcel" (as defined in s. 2 of the SMA), let alone prohibit STR with regard to the parcels. At the risk of repetition, there is no definition of STR in the SMA.

F **[32]** In our considered view, even before the voting regarding Resolution No. 3 in the plaintiff's sixth AGM, there is nothing in the HR which allows the plaintiff to prohibit STR in respect of the use of the parcels. Our reasons are as follows:

G (i) there is no definition of STR in the HR; and

(ii) according to r. 2.1(a) of the HR:

The Units are constructed for private residential dwellings and shall be used exclusively for private residential purpose only. (emphasis added)

H Rule 2.1(a) of the HR does not confer any right or power on the plaintiff to prohibit STR.

[33] As explained in the above paras. 30 to 32, the learned High Court Judge had committed an error of law in deciding that the plaintiff could prohibit STR in respect of the parcels pursuant to the HR (High Court's third
I legal error).

[34] Section 70(2) of the SMA provides as follows:

> 70(2) *A [MC] may, by special resolution, make additional by-laws or make amendments to such additional by-laws, not inconsistent with the by-laws prescribed by the regulations made under section 150, for regulating the control,* management, administration, *use and enjoyment of the subdivided building or land and the common property,* including all or any of the following matters:
>
> (a) safety and security measures;
>
> (b) details of any common property of which the use is restricted;
>
> (c) the keeping of pets;
>
> (d) parking;
>
> (e) floor coverings;
>
> (f) refuse control;
>
> (g) behaviour;
>
> (h) architectural and landscaping guidelines to be observed by all proprietors; and
>
> (i) imposition of fine not exceeding two hundred ringgit against any proprietor, occupant or invitee who is in breach of any of the by-laws. (emphasis added)

The first and 203rd defendants had adduced sufficient evidence, namely:

(i) video recordings of the plaintiff's sixth AGM;

(ii) minutes of the plaintiff's sixth AGM; and

(iii) the oral evidence of four witnesses who attended the plaintiff's sixth AGM, *ie*, SD1, SD2, SD3 and SD4

(a) to prove on a balance of probabilities that the plaintiff's sixth AGM had passed Resolution No. 3 pursuant to s. 70(2) of the SMA by way of a "special resolution" (defined in s. 2 of the SMA as "a resolution which is passed at a duly convened general meeting of which at least twenty-one days' notice specifying the proposed resolution has been given, and carried by a majority consisting of not less than three-quarters of the valid votes cast at the general meeting by a show of hands, or if a poll is demanded and taken, by a majority consisting of not less than three-quarters in number of the valid votes cast on such poll").

Resolution No. 3 stated as follows:

> 1. *The Unit Owner and lessee shall comply to (sic) the guideline (Prosedur Operasi Standard Aktiviti Penginapan Sementara Jangkamasa Pendek Kepada Pemaju/JMB/MC di Wilayah Persekutuan) issued by (COB KL) in line with (SMA).*

2. *To impose a penalty of RM200.00 for each non-compliance to (sic) (HR).*

3. All penalties shall be payable and a debt due to [MC] by the Unit Owner. (emphasis added)

[35] Resolution No. 3 is significant because Resolution No. 3 had been approved by way of a special resolution (as defined in s. 2 of the SMA). The wishes of "not less than three-quarters of the valid votes cast" at the plaintiff's 6th AGM (which approved Resolution No. 3) should have been considered by the learned High Court Judge in this case (High Court's fourth legal error). We rely on the following Federal Court's judgment delivered by Tengku Maimun CJ in *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285; [2020] 12 MLJ 16, at [26]:

> [26] *The [SMA] is without doubt, a social legislation. It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the [SMA] which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in Ang Ming Lee and Hoh Kiang Ngan.* (emphasis added)

[36] We have not overlooked the SPAs and DMCs. The SPAs and DMCs, in our view, did not contain any prohibition of STR with regard to the parcels. In any event, upon the enforcement of the HR, the SPAs and DMCs "shall cease to have effect" as provided by s. 148 of the SMA. We reproduce below s. 148 of the SMA:

> *s 148. Non-application of other written laws, contracts and deeds*
>
> *On the coming into operation of [SMA], in a local authority area or part of a local authority area or in any other area, the provisions of any written law, contracts and deeds relating to the maintenance and management of buildings and common property in as far as they are contrary to the provisions of this Act shall cease to have effect within the local authority area or that other area.* (emphasis added)

Premised on the above reasons, the learned High Court Judge had committed an error of law in misconstruing the SPAs and DMCs in this case (High Court's fifth legal error).

Adequate Legal Remedies For Tort Of Private Nuisance And Illegal Use Of Parcels

[37] We have to emphasise that if any parcel owner or "occupier" of a parcel (as defined in s. 2 of the SMA as a "person in actual occupation or control of the parcel or land parcel, but, in the case of a premises for lodging purposes, does not include a lodger"):

(i) commits a tort of private nuisance which adversely affects the quiet use and enjoyment of the other parcel owners (aggrieved parcel owners);

(ii) uses or occupies the parcel for an illegal purpose; and

(iii) damages the common property;

(a) the aggrieved parcel owners and plaintiff may:

(1) file a civil suit based on the tort of private nuisance; and/or

(2) lodge a police report.

Our Answers To The Agreed Issues To Be Tried

[38] Premised on the evidence adduced in this case, we answer the agreed issues to be tried as follows:

(i) the first agreed issue to be tried – resolution no. 3 had been lawfully passed at the plaintiff's sixth AGM pursuant to s. 70(2) of the SMA;

(ii) the second agreed issue to be tried – in view of resolution no. 3, this suit had not been lawfully filed by the plaintiff;

(iii) the third agreed issue to be tried – the plaintiff should have prepared the latest HR (which should incorporate resolution no. 3 which had been passed at the plaintiff's sixth AGM) and should have filed the latest HR with the COB within 30 days from the date of the passing of resolution no. 3 (as required by s. 70(6) of the SMA);

(iv) the fourth agreed issue to be tried – as resolution no. 3 is in force, the plaintiff should have obtained the mandate and consent of the members of the plaintiff before filing this suit against the defendants;

(v) with regard to the fifth agreed issue to be tried:

(a) as a general rule (general rule), a party (T) who applies for an interlocutory injunction, be it an *ex parte* or *inter partes* interlocutory injunction, is required to provide an undertaking to pay damages (Undertaking) to the opposing party (U). This is clear from O. 29 r. 1(4) of the RC which provides for Form 53 in Appendix A to RC (Form 53) to be the form for an interim injunction. We reproduce below O. 29 r. 1(4) of the RC and Form 53:

> O. 29 r. 1(4) An order for interim injunction shall be in Form 53.
>
> Form 53
>
> ORDER FOR INTERIM INJUNCTION (O. 29, r. 1)
>
> (Title as in action)
>
> Upon the application of ..... and upon reading the affidavit ..... filed the.....day of....., 20....., and *upon* hearing ....., and *the plaintiff by his said ..... undertaking to abide by any order the Court or a Judge may make as to damages in case the Court or a Judge should hereafter be of opinion that the defendant*

A ..... *shall have sustained any by reason of this order which the plaintiff ought to pay.* It is ordered and directed that the defendant(s) (a) ..... by himself (themselves) his (their) agents or servants or otherwise be restrained, and an Injunction is hereby granted restraining him (them) from .....

B (emphasis added);

(b) in accordance with the general rule, the court should consider Y's financial ability to satisfy the undertaking and may exercise its discretion to order Y to fortify the undertaking – please refer to the C judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293; [1995] 1 MLJ 193, at 207; and

(c) Y has to apply to court for an exemption to provide the undertaking. The court has a discretion to dispense with the undertaking – *Keet* D *Gerald*, at p. 207; and

(vi) as for sixth agreed issue to be tried:

(a) r 2.1(a) HR is contrary to the express land condition; and

(b) the additional r 2.1(e) HR has expressly allowed the use of the E parcels in accordance with the guidelines issued by the COB with regard to "Aktiviti Penginapan Sementara Jangkamasa Pendek". Rule 2.1(e) HR should prevail over r 2.1(a) HR because the former is a later provision passed by "not less than three-quarters of the valid votes cast" at the plaintiff's 6th AGM. Such a decision is F supported by the canon of construction, *lex posterior derogant non priori* (the subsequent provision shall prevail over the earlier provision).

Outcome Of This Appeal

G **[39]** Premised on the above evidence and reasons, especially the High Court's first to fifth legal errors, we allow this appeal with the following order:

(i) the entire High Court's decision is set aside; and

H (ii) we enter judgment in favour of the first and 203rd defendants against the plaintiff as follows:

(a) this suit against the first and 203rd defendants is dismissed;

(b) a sum of RM80,000 shall be paid by the plaintiff to the first and 203rd defendants as costs for this suit and this appeal;

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(c) an assessment of damages (assessment (damages)] for all loss suffered by the first and 203rd defendants due to:

(1) *ex parte* interlocutory injunction;

(2) *inter partes* interlocutory injunction; and

(3) the perpetual injunctions granted in the High Court's decision

- shall be conducted by another High Court Judge or Judicial Commissioner (J/JC);

(d) the costs of the assessment (damages) shall be determined by the J/JC and shall be paid by the plaintiff to the first and 203rd defendants; and

(e) by virtue of s. 11 of the Civil Law Act 1956 and O. 42 r. 12 of the RC, the J/JC has a discretion to award interest on the sum of damages assessed at the assessment (damages) and such interest shall be paid by the plaintiff to the first and 203rd defendants.